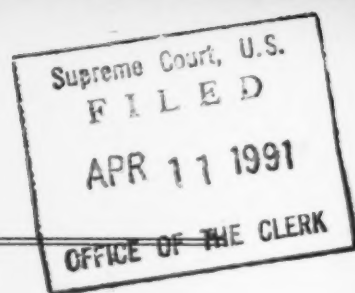


No. 90-1086



In The
Supreme Court of the United States
October Term 1990

CALIFORNIA ASSOCIATION OF
PHYSICALLY HANDICAPPED, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petition For Writ of Certiorari To The United States
Court of Appeals For The Ninth Circuit

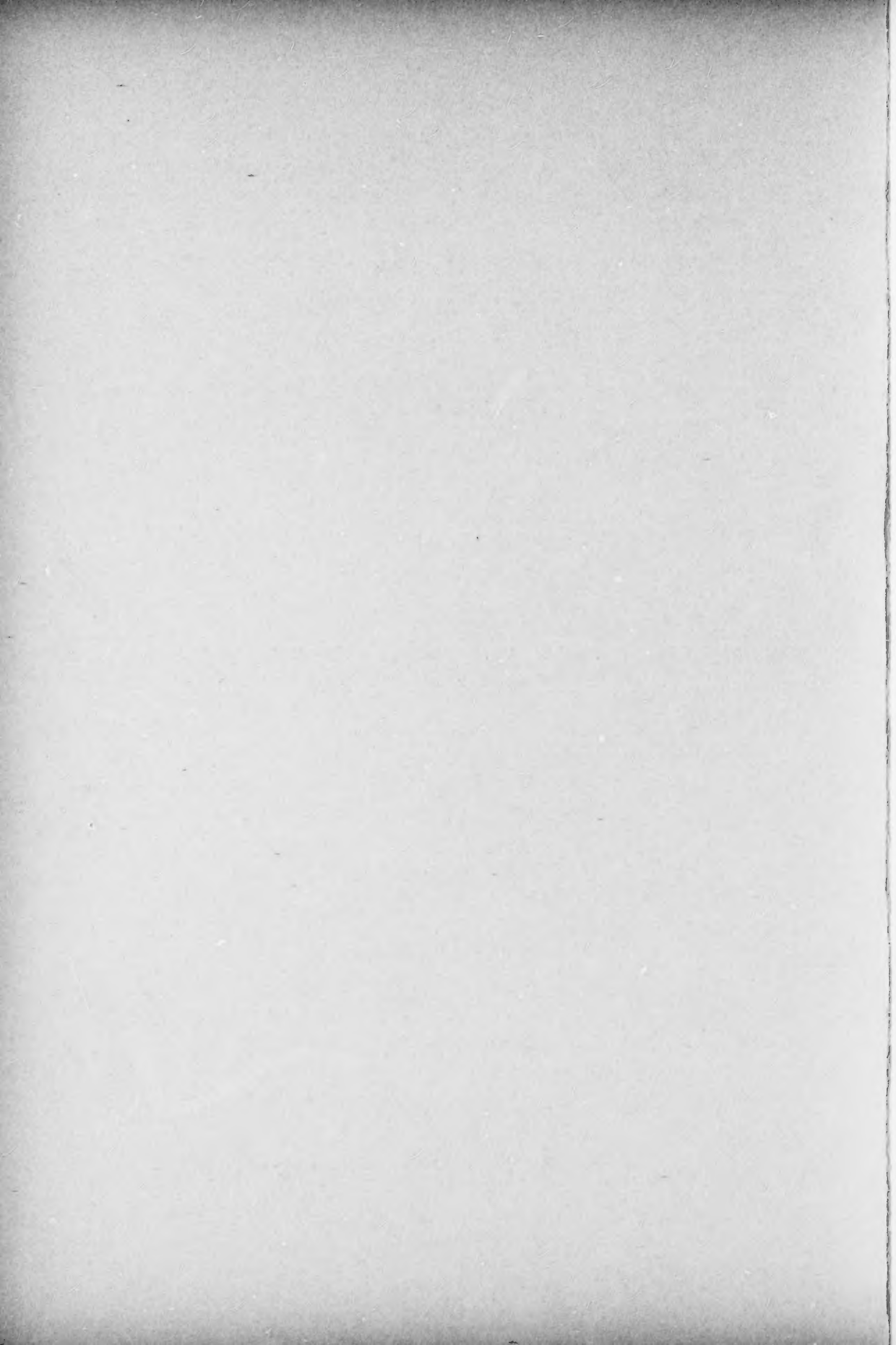
REPLY TO BRIEF FOR THE
RESPONDENT IN-OPPOSITION

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Respondent by its silence on key issues virtually concedes that *res judicata* does not apply in this case, but asserts that the lower court's dismissal of petitioner's challenge to the Commission's legislative rule is "unexceptionable." Br. for Resp. 8. Presumably respondent means the issue is not of sufficient importance.

1. Respondent silently acknowledges that claim preclusion does not bar this proceeding. Br. for Resp. 6 n.5. While respondent asserts that the issues petitioner raises in this proceeding have already been decided in the license case (*California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88 (D.C. Cir. 1988)), respondent is mistaken on this score. In the license case the issue was whether the Commission should deny license renewal applications of a broadcaster who, *in the absence of a FCC rule requiring such action*, fails to caption a reasonable portion of its programs or refuses to provide handicapped individuals with equal employment opportunities. In this case the issues are whether the Commission's licensing and equal employment opportunity programs are "programs or activities" within the meaning of the Rehabilitation Act and whether the Commission must therefore provide by rule for administering those programs in a non-discriminatory fashion.

Issue preclusion does not apply because the issues raised in this proceeding are not identical in all respects with that decided in the license case and because the issues raised in this case were not "actually and necessarily determined" in the license case. See *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-60 (1948); *Montana v. United States*, 440 U.S. 147, 153 (1979); see also Restatement (Second) of Judgments § 27 (1982) (issue

preclusion applies only to issues "actually litigated and determined" in a prior proceeding).

Even if the doctrine of res judicata arguably would otherwise apply, it is inapplicable here because "[t]he public interest considerations in assuring that the FCC complies with the Rehabilitation Act and the Constitution outweigh the concerns that undergird res judicata." Pet. Question 3(c). Respondent does not address this issue.¹

2. The public interest considerations in this case are great and of continuing concern. The legislative rule petitioner challenges speaks "to the world at large," and "[a]ll persons adversely affected by that rule would have standing to challenge its compliance with legal prescriptions designed for their protection." *Radiofone, Inc. v. FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (Scalia, J.).

In erroneously applying res judicata to bar petitioner from challenging the Commission's legislative rule in an unreported, unreasoned one-page opinion that does not cite a single case dealing with res judicata, the Ninth Circuit denied millions of Americans with disabilities of rights granted by Congress. The ruling also undermines the Americans With Disabilities Act, Pub. L. 101-336 § 2(b), 104 stat. 329 (July 26, 1990). Pet. 11.

¹ In *Candelario v. Postmaster General*, 906 F.2d 798, 802 (1st Cir. 1990) the court ruled that res judicata should not be invoked against the Postmaster General "when its application would not serve its underlying purposes or goals." The Solicitor General defended this proposition in this Court. Br. For the Resp. in Opposition in *Candelario v. Frank*, No. 90-863, 10-11.

The ruling below needlessly, and erroneously, denies hearing impaired individuals of the opportunity to enjoy television and denies Americans with disabilities of equal employment opportunities in the broadcast industry. This case therefore is of exceptional importance nationwide.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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